

CHALLENGING MANAGED TEMPORARY LABOR MIGRATION AS A MODEL FOR RIGHTS AND DEVELOPMENT FOR LABOR-SENDING COUNTRIES

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I. INTRODUCTION

Half of the world's two hundred million migrants are temporary migrant workers.¹ Temporary labor migrants are unskilled or low-skilled workers of several types: contract migrant workers, prevalent in Asia and the Middle East; guest workers, associated with European immigrants and U.S. agricultural labor; and irregular (unauthorized) migrant workers.²

1. The latest authoritative statistics on international migration from 2005 are documented by the United Nations Population Division and the Global Commission on International Migration. See U.N. Dep't of Econ. and Soc. Affairs, Population Div., *Trends in Total Migrant Stock: The 2005 Revision*, 1, U.N. Doc. POP/DB/MIG/Rev.2005/Doc (2005), available at http://www.un.org/esa/population/publications/migration/UN_Migrant_Stock_Documentation_2005.pdf; GLOBAL COMM'N ON INT'L MIGRATION, *MIGRATION IN AN INTERCONNECTED WORLD: NEW DIRECTIONS FOR ACTION 1* (2005), available at <http://www.gcim.org/attachements/gcim-complete-report-2005.pdf> [hereinafter GLOBAL COMM'N] (citing UN Population Division); INT'L LABOR ORG. (ILO), *TOWARDS A FAIR DEAL FOR MIGRANT WORKERS IN THE GLOBAL ECONOMY 7* (2004), available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc92/pdf/rep-vi.pdf> [hereinafter ILO, *TOWARDS A FAIR DEAL*] (indicating 80.9 million migrant workers out of 174.9 million migrants in 2000). A migrant worker is "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national." International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, G.A. Res. 45/158, art. 2(1), U.N. Doc. A/RES/45/158 (Dec. 18, 1990) [hereinafter *Migrant Workers Convention*].

2. Temporary migrants are usually ineligible for legal permanent settlement. See INT'L ORG. FOR MIGRATION (IOM), *INTERNATIONAL MIGRATION LAW: GLOSSARY ON MIGRATION* 64 (2004), available at <http://www.old.iom.int/DOCUMENTS/PUBLICATION/EN/Glossary.pdf> (defining temporary migrant workers as "[s]killed, semi-skilled or untrained workers who remain in the receiving country for definite periods as determined in a work contract with an individual worker or a service contract concluded with an enterprise"); GLOBAL COMM'N, *supra* note 1, at 7-8 (noting regional

Today, international labor migration is high on the agendas of intergovernmental organizations such as the International Organization for Migration (IOM),³ the International Labour Organization (ILO),⁴ the World Bank,⁵ and the United Nations (UN) General Assembly.⁶ Individual governments themselves are challenged with policy issues related to international labor migration, including economic development, labor market needs, human rights protection, illegal im-

differences in the predominant form of migration); James F. Hollifield, *The Emerging Migration State*, 38 INT'L MIGRATION REV. 885, 893 (2004) (noting that some developing states have negotiated contract or guest workers schemes that do not allow settlement or family reunification).

3. The IOM is an intergovernmental organization composed of 120 Member States and with offices in over 100 countries that promotes cooperation on migration, seeks solutions to migration problems, and provides humanitarian assistance to migrants. See IOM, About IOM, <http://www.iom.int/jahia/page2.html> (last visited Nov. 14, 2007).

4. The ILO was founded in 1919 and became a United Nations specialized agency in 1946. It formulates conventions and standards relating to labor rights and provides assistance to governments. It has a unique tripartite structure in which governments, workers, and employers participate on an equal basis in its governing organs. See ILO, About the ILO, <http://www.ilo.org/public/english/about/index.htm> (last visited Nov. 14, 2007).

5. The World Bank's research department has launched a program on migration and recently focused its flagship publication, *Global Economic Prospects*, on the economic consequences of migration. See WORLD BANK, GLOBAL ECONOMIC PROSPECTS 2006: ECONOMIC IMPLICATIONS OF REMITTANCES AND MIGRATION, at vii (2006), available at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2005/11/14/000112742_20051114174928/Rendered/PDF/343200GEP02006.pdf.

6. See ILO, TOWARDS A FAIR DEAL, *supra* note 1, at 126-27 (describing the growing cooperation between governments at the bilateral level and, increasingly, at the regional and multilateral levels). The UN General Assembly held a first-ever High-Level Dialogue on International Migration and Development in September 2006. See generally U.N. Dep't of Econ. & Soc. Affairs, Population Div., High Level Dialogue on International Migration and Development, <http://www.un.org/esa/population/hldmigration> (last visited Nov. 19, 2007). As the UN stated in preparation for the Dialogue, "[s]ince 1990 the prominence of international migration on the international agenda has been rising, with the result that Governments have been actively seeking novel ways of addressing the issues and concerns it raises." U.N. Dep't of Econ. & Soc. Affairs, Population Div., *Compendium of Recommendations on International Migration and Development: The United Nations Development Agenda and the Global Commission on International Migration Compared*, 5, U.N. Doc. ESA/P/WP.197 (2006), available at http://www.un.org/esa/population/publications/UN_GCIM/UN_GCIM_ITTMIG.pdf.

migration, and social and cultural integration.⁷ Receiving countries demand labor but usually do not wish to fully integrate migrants into their societies.⁸ Sending countries, on the other hand, want their citizens to find jobs abroad but also want them to send remittances and eventually return home with the skills they have acquired.⁹

Considering the interests of both sending and receiving countries, international organizations and individual states have largely reached the consensus that, if properly managed, temporary labor migration can promote sending countries' interests in economic development¹⁰ and protecting migrant workers' rights while simultaneously fulfilling receiving countries' demand for labor and desire to limit permanent immigration.¹¹ Accordingly, the management of temporary labor

7. See generally PETER STALKER, *WORKERS WITHOUT FRONTIERS: THE IMPACT OF GLOBALIZATION ON INTERNATIONAL MIGRATION* (2000).

8. In this Note, "sending countries" refers to migrants' countries of origin and "receiving countries" refers to destination countries. The word "sending" connotes an activist stance on the part of the state of origin befitting this Note's focus on a paradigm that encourages states to proactively control the flow of and harness the economic benefits of labor migration. *But see* Eva Østergaard-Nielsen, *Sending Countries: Key Issues and Themes*, in *INTERNATIONAL MIGRATION AND SENDING COUNTRIES: PERCEPTIONS, POLICIES AND TRANSNATIONAL RELATIONS* 3, 7 (Eva Østergaard-Nielsen ed., 2003) (noting that "the term 'sending countries' is ambiguous because few states actually 'send' or 'export' their citizens abroad through unilateral policies or bilateral 'exchange' programmes").

9. Kim Barty, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11, 31 (2006).

10. IOM, *INTERNATIONAL MIGRATION AND DEVELOPMENT: PERSPECTIVES AND EXPERIENCES OF THE INTERNATIONAL ORGANIZATION FOR MIGRATION* 12 (2006), available at <http://www.un.int/iom/IOM%20Perspectives%20and%20Experiences.pdf>; ILO, *TOWARDS A FAIR DEAL*, *supra* note 1, at 118; *see also* MARTIN RUHS, *THE POTENTIAL OF TEMPORARY MIGRATION PROGRAMMES IN FUTURE INTERNATIONAL MIGRATION POLICY* 1 (Sept. 2005), available at <http://www.gcim.org/attachements/TP3.pdf> (noting the contentiousness of temporary migration programs and proponents' belief that "innovative policy designs could help avoid the past policy mistakes and generate significant benefits for all sides involved, including migrant workers and their countries of origin").

11. PHILIP L. MARTIN, *MANAGING LABOR MIGRATION: TEMPORARY WORKER PROGRAMS FOR THE 21ST CENTURY* 30-31 (2003), available at <http://www.ilo.org/public/english/bureau/inst/download/migration3.pdf>.

migration has been the focus of domestic, bilateral, and multi-lateral discussions and initiatives.¹²

This Note analyzes the emerging paradigm of managed temporary labor migration as formulated by international organizations and promoted to sending countries. Through an analysis of the activities of international organizations and sending country governments, I challenge the claim that this paradigm benefits sending countries and migrant workers.¹³ Instead, I argue that sending countries lack adequate institutional capacity to manage temporary labor migration and that the practical and theoretical assumptions underlying the paradigm's assertions about the costs and benefits of temporary labor migration are flawed. As a result, sending countries should be cautious about accepting the paradigm.

The Note unfolds in four parts. Part II describes the emerging paradigm in more detail. I lay out the two priorities of the paradigm, promoting economic development and protecting the rights of migrants, using the Philippines as an example of the paradigm in practice. Despite the paradigm's laudable goals, as Part III explains, many sending countries lack the institutional capacity necessary to implement its policies. Institutional infrastructure is essential to protect migrants' rights and to transform emigration into national economic development. The obvious solution to this problem is capacity building; however, capacity building is complicated and cannot guarantee that the paradigm will succeed.

Aside from the capacity constraint, the paradigm fails to address practical and theoretical problems rooted in structural inequalities of the global economy. Part IV develops this argument. In Part IV.A, I contend that the paradigm ignores evidence that migration does not lead to development and that economic reliance on emigration actually undermines the protection of migrants' rights. As I point out in Part IV.B, the

12. See IOM, *Illustration of Multilateral, Regional and Bilateral Cooperative Arrangements in the Management of Migration*, in *MIGRATION AND INTERNATIONAL LEGAL NORMS* 305 (T. Alexander Aleinikoff & Vincent Chetail eds., 2003) (providing an overview of international cooperation efforts).

13. Relatively few Western studies on international migration have examined international organizations and sending country governments. See Douglas S. Massey, *International Migration at the Dawn of the Twenty-First Century: The Role of the State*, 25 *POPULATION & DEV. REV.* 303, 310 (1999) (noting the paucity of analyses of the role of the state in sending societies).

paradigm's theoretical justification is that migration is the result of individual choices in the free market and that migrants should enjoy freedom of movement. However, this theoretical foundation provides an incomplete and biased account both of the way labor migration actually is and of the way it should be.

It is necessary to rethink the paradigm, but doing so may be difficult because the paradigm is framed as a value-neutral process of designing and implementing the best labor migration program. As Part V contends, the perception of the paradigm as a set of objective and non-political best practices fosters path dependence and tunnel vision in domestic political and economic decisionmaking. Thus, the paradigm is not a set of technical best practices but rather a set of political choices.

II. BACKGROUND ON THE PARADIGM OF MANAGED TEMPORARY LABOR MIGRATION

All states share an interest in the “[h]umane and orderly management of migration.”¹⁴ Recognizing this shared interest, international cooperation on migration has proliferated, leading to the development of the paradigm I define as “managed temporary labor migration.” This Part first describes the paradigm and then introduces the “model” migration management system in the Philippines, a country that sends many temporary migrant workers to other countries. I conclude Part II by explaining the appeal of the emerging paradigm.

A. *The Paradigm's Principles and Goals: Migrants' Rights and Economic Development*

The emerging paradigm among international organizations and states is based on the idea that while all states have the sovereign right to manage migration, they also have common principles and shared interests.¹⁵ At the heart of the par-

14. IOM & THE FED. OFFICE FOR MIGRATION, INTERNATIONAL AGENDA FOR MIGRATION MANAGEMENT 23 (2005), available at http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/IAMM.pdf [hereinafter INTERNATIONAL AGENDA FOR MIGRATION MANAGEMENT].

15. ILO, *Draft ILO Multilateral Framework on Labour Migration*, § IV, I.L.O. Doc. TMMFLM/2005/1 (Nov. 2, 2005), available at <http://www.ilo.org/pub->

adigm are respect for migrants' rights and the expectation that migration should have economic benefits for sending and receiving countries alike.¹⁶ These principles reflect the current state of international cooperation on migration, which has moved beyond traditional unilateral policy but has not yet reached the level of an international rights-based regime.¹⁷ The principles find practical expression in the rise of managed temporary labor migration as a policy solution to help states manage their borders, meet economic and social needs, and respect the rights of migrant workers.

International organizations such as the ILO and the IOM formulate and transmit the policies and programs for managing temporary labor migration to both sending and receiving countries.¹⁸ These organizations tell sending countries that

lic/english/standards/relm/gb/docs/gb295/pdf/tmmflm-1.pdf [hereinafter *ILO Draft Framework*] (asserting a sovereign right to manage migration); INTERNATIONAL AGENDA FOR MIGRATION MANAGEMENT, *supra* note 14, at 18 (claiming the existence of “[a] set of common understandings outlining fundamental shared assumptions and principles underlying migration management”).

16. Principle IX of the ILO’s draft framework, for example, states: “The contribution of labour migration to employment, economic growth, development and the alleviation of poverty should be recognized and maximized for the benefit of both origin and destination countries.” *ILO Draft Framework*, *supra* note 15, § IX; *see also* INTERNATIONAL AGENDA FOR MIGRATION MANAGEMENT, *supra* note 14, at 58 (“Properly managed, international migration can contribute to the development of both countries of origin and destination.”); *id.* at 19-20 (stating that participants at four international meetings of the Berne Initiative “repeatedly stressed the positive contributions that migration and migrants make to the social, cultural and economic development of countries of origin and destination alike”).

17. Traditional migration policy focused on sovereign control of migratory flows, the regulation of foreign nationals in the territory of the state, and relations with other states, while human rights were of secondary concern. Special Rapporteur of the Comm’n on Human Rights, *Report on the Human Rights of Migrants*, ¶ 52, U.N. Doc. A/59/377 (Sept. 22, 2004). An international regime could take as its foundation, or forebearers, the ILO Conventions pertaining to international labor migration and the Migrant Workers Convention. *See, e.g.*, Migrant Workers Convention, *supra* note 1; *see also* Bryan Paul Christian, *Visa Policy, Inspection and Exit Controls: Transatlantic Perspectives on Migration Management*, 14 GEO. IMMIGR. L. J. 215 (1999) (dealing with immigration controls, a traditional topic of migration management). *See generally* HUMAN RIGHTS AND FORCED DISPLACEMENT (Anne F. Bayefsky & John Fitzpatrick eds., 2000) (dealing with forced migration).

18. This Note considers the publications of the IOM and ILO as representative of the emerging conventional wisdom, as these organizations’ man-

temporary labor migration is a way to promote economic development while respecting the rights and dignity of their emigrant citizens.¹⁹ They convey this paradigm as a set of best practices for achieving these goals through technical assistance projects and educational programs.²⁰

dates overlap with respect to labor migration. The ILO is involved only in the management of labor migration, given its central goal of protecting workers' rights. The International Labour Office is the permanent secretariat of the International Labour Organization and the "focal point for ILO's overall activities." ILO, *How the ILO Works*, http://www.ilo.org/global/About_the_ILO/Structure/lang—en/index.htm (last visited Jan. 8, 2008). The International Migration Branch of the ILO is responsible for the organization's involvement in labor migration. Constitution of the International Organization for Migration, art. 1, <http://www.iom.int/jahia/page225.html> (last visited Nov. 28, 2007) (IOM mandate emphasizing migration management); ILO, *International Labour Migration—Goals & Objectives*, <http://www.ilo.org/public/english/protection/migrant/about/objectives.htm> (last visited Nov. 28, 2007); see also *ILO Draft Framework*, *supra* note 15; International Agenda for Migration Management, *supra* note 14 (both expressing the emerging consensus on the principles and policies that are the focus of this Note). For an account of the similarities and differences between the ILO framework and action plan and the Berne Initiative process and agenda, see Piyasiri Wickramasekara, Statement on Behalf of the International Labour Office (ILO) at the Berne II Conference 3-5, (Dec. 16-17, 2004), available at http://web.archive.org/web/20060212015057/http://www.bfn.admin.ch/fileadmin/user_upload/Themen_deutsch/Internationales/The_Berne_Initiative/ilo_statement_berne_ii_conference.pdf [hereinafter Wickramasekara, Statement]. The IOM and ILO are not necessarily accepted as leaders among international organizations in the governance of international migration, which is still a nascent concept. See KATHLEEN NEWLAND, *THE GOVERNANCE OF INTERNATIONAL MIGRATION: MECHANISMS, PROCESSES AND INSTITUTIONS* 1-14 (2005), available at <http://www.gcim.org/mm/File/TS%208b.pdf>.

19. See, e.g., 2 IOM, *ESSENTIALS OF MIGRATION MANAGEMENT* § 2.6, at 4 (2005), available at http://www.old.iom.int//DOCUMENTS/PUBLICATION/EN/V2S06_CM.pdf [hereinafter *ESSENTIALS OF MIGRATION MANAGEMENT—MIGRATION AND LABOUR*] (stating that the rationale behind labor migration policies is "to manage recruitment activities, to ensure that the rights and interests of migrant workers are respected, and to maximize the benefits for the economy from labour migration"); Wickramasekara, Statement, *supra* note 18, at 4 (stating that the objectives of the ILO and Berne initiatives are similar, namely improving migration policy and its governance, protection of migrant workers, and promoting development and migration linkages).

20. For example, the IOM organized a research project called Cooperative Efforts to Manage Emigration to analyze best practices in migration management in receiving, transit, and sending countries. Philip Martin & Thomas Straubhaar, *Best Practices to Reduce Migration Pressures*, INT'L MIGRA-

The paradigm is intended to promote sending country economic development in several ways: Remittances provide a crucial source of foreign currency;²¹ governments gain public revenue through migration-related fees and income taxes;²² migrants invest in businesses, public and private development projects, and financial instruments;²³ and the private sector invests remittances in businesses.²⁴ Sending country governments may actively encourage investment in the sending country. For example, Mexico's *Tres por Uno* program encouraged migrant associations in the United States to fund local development projects by matching every dollar received with a dollar each from municipal, state, and federal governments.²⁵ In sum, the paradigm urges sending states to channel remitted income earned abroad to uses that promote national economic development, including the creation of more domestic jobs.²⁶

The paradigm requires sending countries to protect the rights of migrant workers by adopting certain principles and policies. First, governments must respect workers' freedom of

TION, Special Issue 1, 2002, at 18. The ILO also analyzes best practices. See, e.g., *ILO Draft Framework*, *supra* note 15, annex II (cataloguing best practices in labor migration management).

21. STALKER, *supra* note 7, at 81.

22. *Id.* at 122.

23. Barry, *supra* note 9, at 28-29.

24. See generally *ILO Draft Framework*, *supra* note 15, § IX; INTERNATIONAL AGENDA FOR MIGRATION MANAGEMENT, *supra* note 14, at 58-61; 2 IOM, ESSENTIALS OF MIGRATION MANAGEMENT § 2.3, at 11 (2005) [hereinafter ESSENTIALS OF MIGRATION MANAGEMENT—MIGRATION AND DEVELOPMENT] (concerning the return of skill and technology to workers' homelands, remittances and money transfers, connecting overseas communities with local investment opportunities, enterprise creation through transnational business initiatives and micro-enterprise, facilitating the transfer of capital, skills, and technology by migrant workers, and other ways of productively investing remittances).

25. KEVIN O'NEIL ET AL., MIGRATION IN THE AMERICAS 28, available at <http://www.gcim.org/attachements/RS1.pdf>. The *Tres por Uno* program was suspended because its popularity exceeded the government's capacity to match funds. *Id.* The program funded a variety of infrastructure projects, such as installing water supply systems, renovating schools, and building roads. ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), ECONOMIC SURVEYS: MEXICO VOLUME 2003, at 151 (2004).

26. *ILO Draft Framework*, *supra* note 15, § IX, ¶ 15.2 (emphasizing employment creation as a part of the development goal).

movement as required by international human rights law.²⁷ Second, governments must channel migration through the bureaucratic and legal systems, thereby reducing problems such as human trafficking.²⁸ International labor migration management must balance respect for each individual's freedom of movement with the right of sovereign states to control their borders.²⁹ Third, the paradigm promotes bilateral labor agreements between sending and receiving states³⁰ and multi-lateral agreements such as the UN Migrant Workers Convention.³¹ Finally, the paradigm encourages sending countries to consider domestic regulations and legal remedies for the protection of citizens working abroad.³² Sending countries may set criteria on who may migrate, impose education requirements, establish minimum standards to assist migrants in assessing terms of employment, regulate the licensing of recruiters, and provide legal remedies to workers for contract and other violations.³³

27. G.A. Res. 217A, art. 13, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948); International Covenant on Civil and Political Rights art. 12, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171; Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Sept. 16, 1963, Europ. T.S. 46; American Convention on Human Rights art. 22, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123; African Charter on Human and People's Rights art. 12, *adopted* June 1981, 1520 U.N.T.S. 217.

28. See IOM, Regulating Migration, <http://www.iom.int/jahia/page546.html> (last visited Nov. 27, 2007) (describing regulated migration as “[c]omprehensive, transparent and coherent approaches to migration management [that] can help address irregular migration” and “ensure orderly and humane population movements”).

29. IOM, Rights & Obligations of Migrants, <http://www.iom.int/jahia/page266.html> (last visited Apr. 7, 2007).

30. ESSENTIALS OF MIGRATION MANAGEMENT—MIGRATION AND LABOUR, *supra* note 19, at 23; Migrant Workers Convention, *supra* note 1, arts. 64, 65(2), 81(1)(b).

31. See Migrant Workers Convention, *supra* note 1.

32. See *generally* IOM, LABOUR MIGRATION IN ASIA: PROTECTION OF MIGRANT WORKERS, SUPPORT SERVICES AND ENHANCING DEVELOPMENT BENEFITS 17-62 (2005), *available at* http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/labour_migration_asia.pdf [hereinafter LABOUR MIGRATION IN ASIA 2005] (describing regulatory frameworks for recruitment of migrant workers and minimum standards in migrants' employment contracts in Pakistan, the Philippines, and Sri Lanka).

33. *Id.*

B. *An Example of the Paradigm in Practice: The Philippines Model*

Philippine labor migration policy is a prototype of the paradigm for sending countries because it “emphasizes temporary labour migration, worker protection and maximizing the development impact of remittances.”³⁴ The government of the Philippines has committed significant administrative resources to promoting and managing labor migration, with the result that the country recently surpassed Mexico as the world’s largest labor exporter with over eight million overseas foreign workers (OFWs).³⁵ Filipino temporary contract workers—not including those overseas illegally—remitted over ten billion U.S. dollars in 2005 in official transfers.³⁶ The Asian Development Bank estimates the real figure at fourteen to twenty-one billion dollars, up to thirty-two percent of the Philippines’ gross national product.³⁷

Since the late 1970s, the Philippines has promoted regulated temporary labor migration as an engine for economic development.³⁸ As a top government official described it, the Filipino labor emigrant is the “agent of development.”³⁹ The

34. *ILO Draft Framework*, *supra* note 15, annex II, ¶ 37.

35. As of December 2004, an estimated 8.1 million Filipinos—nearly 10% of the country’s 85 million people—were working and/or residing abroad. Approximately one-fourth of these went abroad for permanent residence, while three-fourths are temporary migrant workers. See Philippine Overseas Employment Administration (POEA), Overseas Employment Statistics, <http://www.poea.gov.ph/html/statistics.html> (last visited Jan. 3, 2008). Total stock numbers of overseas workers are available at <http://www.poea.gov.ph/docs/STOCK%20ESTIMATE%202004.xls>.

36. These remittance data do not include migrants who are not temporary contract workers. See POEA, OFW Remittances, http://www.poea.gov.ph/stats/remittance_1997_2006.html (last visited Jan. 8, 2008).

37. George Wehrfritz & Marites Vitug, *Workers for the World*, NEWSWEEK INT’L, Oct. 4, 2004, at 39.

38. See David M. Forman, *Protecting Philippine Overseas Contract Workers*, 16 COMP. LAB. L.J. 26, 33 (1994) (noting that in 1978 labor exportation went from being “a temporary answer to the country’s unemployment and severe balance of payment problems” to “an official component of the national development strategy”); Kevin O’Neil, *Labor Export as Government Policy: The Case of the Philippines*, MIGRATION INFO. SOURCE, Jan. 2004, <http://www.migrationinformation.org/feature/display.cfm?ID=191> [hereinafter O’Neil, *Labor Export*] (describing Philippine policy generally).

39. Danilo P. Cruz, Undersec’y for Employment Promotion & Manpower Dev., Dep’t of Labor & Employment (Philippines), Presentation Before the

Philippine government sees labor migration both as a safety valve for a fast-growing labor force facing double-digit unemployment and as a way for Filipino workers to gain the “skills, know-how, and capital” to lift the national economy.⁴⁰ However, many skilled and professional Filipino workers have not returned, causing a large-scale “brain drain” that has depleted the country’s health care and technology sectors in particular.⁴¹ To encourage more workers to come back to the country, the Philippine government has increased its emphasis on re-integration programs that seek to improve returning OFWs’ social and economic well-being.⁴² These programs encourage workers to save money and to invest strategically in small- and medium-scale businesses as a way to use their skills and capital productively.⁴³

The Philippine system is also designed to protect the rights of migrant workers before they leave, while they are abroad, and when they return. The primary governing law is the Migrant Workers and Overseas Filipinos Act of 1995, which strengthened protections for migrant workers and redefined the responsibilities of various agencies.⁴⁴ On the domestic end, the Philippines Overseas Employment Administration (POEA) regulates private sector labor recruiters, markets Filipino workers to receiving countries, conducts global labor market research, and promulgates and enforces rules and regulations pursuant to the 1995 law.⁴⁵ The Department of Labor and Employment maintains labor attachés in all major destina-

World Meteorological Organisation IOM-WB-WTO Trade and Migration Seminar (Oct. 4-5, 2004), http://www.wto.int/english/tratop_e/serv_e/sem_oct04_e/danilo_cruz_philippines_e.ppt (last visited Jan. 8, 2008).

40. Wehrfritz & Vitug, *supra* note 37.

41. *See id.* (noting the desire of middle-class, professional, and technical Filipinos to work abroad and citing the example of Filipino doctors moving to Western countries to work as nurses).

42. Most recently, it has created a Reintegration Secretariat to act as an interagency coordinator of reintegration programs. Press Release, Phil. Dep’t of Labor & Employment, Gov’t to Bolster OFW Reintegration Program (Oct. 26, 2006), *available at* <http://www.dole.gov.ph/news/details.asp?id=N000001953> (last visited Jan. 8, 2008).

43. *See id.*

44. Rep. Act No. 8042 (1995), *reprinted in* 5 CBSI, VITAL LEGAL DOCUMENTS, 364-84 (2d Series 1999).

45. *See* IOM, LABOUR MIGRATION IN ASIA: TRENDS, CHALLENGES AND POLICY RESPONSES IN COUNTRIES OF ORIGIN 141, 145-48 (2003), *available at* <http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/>

tion countries and sites.⁴⁶ The attachés are charged with establishing prevailing wage standards, approving job orders from employers, monitoring the flow of Filipino migrant workers, addressing employment-related problems, and assisting in repatriation and evacuation.⁴⁷ The Overseas Worker Welfare Administration sets standards for pre-departure orientation for migrant workers, assists family members while the workers are overseas, and facilitates the economic and social reintegration of returned workers.⁴⁸ The National Labor Relations Commission adjudicates all monetary disputes between employees on the one hand and foreign employers and Filipino recruiters on the other, holding Filipino recruiters jointly and severally liable for judgments against employers.⁴⁹ In addition, law enforcement agencies are empowered by the anti-trafficking law of 2003 to prosecute the most egregious abuses of migrant workers.⁵⁰

The Philippines' sophisticated regime is considered a model for sending countries. Philippine government agencies host delegations from both sending and receiving countries that wish to learn about the proper management of temporary labor migration.⁵¹ One commentator has noted that the Philippines provides a lesson in the need for "realism and flexibility," as opposed to coercive policies.⁵² While the regime regu-

published_docs/books/LabourMigAsia.pdf [hereinafter LABOUR MIGRATION IN ASIA 2003].

46. *Id.* at 146.

47. *Id.*

48. *Id.* at 141, 145, 148-50.

49. Migrant Workers and Overseas Filipinos Act of 1995, Rep. Act No. 8042, § 10 (1995) (authorizing the original and exclusive jurisdiction of the NLRC and mandating "joint and solidary" liability).

50. Anti-Trafficking in Persons Act of 2003, Rep. Act No. 9208, § 16 (2003).

51. Interview with Rosalinda Baldoz, Adm'r, POEA, in Mandaluyong City, Metro Manila, Philippines (July 1, 2005) (notes on file with the New York University Journal of International Law and Politics). Administrator Baldoz noted that the POEA regularly hosts sending country delegations that want to learn from the POEA's experience as well as receiving countries, such as France and Australia, that are considering temporary worker programs. As a migration hub, the Philippines is the site of the IOM Administrative Center and a 25-year-old IOM country office.

52. O'Neil, *Labor Export*, *supra* note 38. Examples of coercive policies include forcing migrant workers to remit a certain percentage of their earnings, as the administration of former President Ferdinand Marcos required

lates migration, it does so by directing that migration through legal, government-regulated channels and by offering “positive incentives and support” for migrant workers.⁵³ It does not impose quotas on the numbers of workers permitted to leave but will occasionally ban the recruitment of workers to countries where there is a high incidence of abuse. For example, there have been periodic bans on domestic workers to Jordan and a ban on all workers to Iraq since March 2003.⁵⁴ In short, many countries see the Philippines’ temporary labor migration model as an attractive way to promote economic development and protect migrants’ rights.⁵⁵

C. *The Appeal of the Paradigm*

The emerging paradigm of managed temporary labor migration is appealing as a principled framework and technical solution to pressing needs. It provides a way to reassert control in a world in which most migrants are economic migrants and a large percentage of labor migration occurs illegally.⁵⁶ As part of a broader migration management strategy, the paradigm allays concerns about the national security implications of illegal (or “irregular”) migration and the involvement of

in the early 1980s as a way to shore up the country’s foreign currency reserves. See Rene E. Ofreneo & Isabelo A. Samonte, *Empowering Filipino Migrant Workers: Policy Issues and Challenges* 23 (ILO, Int’l Migration Papers No. 64, 2004) (describing past forced remittances policy and current non-coercive reintegration programs).

53. Ofreneo & Samonte, *supra* note 52, at 23.

54. See Press Release, Phil. Dep’t of Labor & Employment, Deployment Ban of DH to Jordan Lifted, Mar. 3, 2005, available at <http://www.dole.gov.ph/news/details.asp?id=N000000452>; Press Release, Phil. Dep’t of Labor & Employment, DOLE Suspends OFW Deployment to Four Mid-East Countries, Mar. 20, 2003, available at <http://www.dole.gov.ph/news/details.asp?id=N000000772>.

55. See Philip Martin, Manolo Abella & Elizabeth Midgley, *Best Practices to Manage Migration: The Philippines*, 38 INT’L MIGRATION REV. 1544, 1544 (2004) (stating that “[t]he Philippine government is recognized as a leader in promoting and regulating the deployment of migrants and seeking to protect them abroad”); O’Neil, *Labor Export*, *supra* note 38; *ILO Draft Framework*, *supra* note 15, annex II, ¶¶ 21-115 (cataloguing best practices, including many examples from the Philippines).

56. See IOM, Labour Migration, <http://www.iom.int/jahia/page706.html> (last visited Nov. 27, 2007) [hereinafter IOM, Labour Migration].

transnational criminal industries in human trafficking.⁵⁷ Underlying these concerns is the likelihood that labor migration will persist due to demographic trends and economic disparities.⁵⁸ If population growth and birth rate projections are accurate, developed countries' already significant need for migrant labor will only increase over time.⁵⁹

The paradigm responds to pressing needs in a universally appealing way. It appears to accommodate all key interests: the labor market needs in receiving countries, the basic rights of migrants, and economic support to sending countries through remittances. In addition, it respects the sovereign right of states to control their borders. The paradigm, in short, promises a generally acceptable approach using familiar policy instruments and regulatory bureaucracies to achieve universally desirable goals. The next two Parts suggest, however, that this paradigm promises more than it delivers for sending countries and migrant workers.

III. THE CAPACITY CONSTRAINT ON ACHIEVING THE GOALS OF THE EMERGING PARADIGM

Sending countries have limited institutional capacity to manage temporary labor migration. This capacity constraint is a function of the less than ideal political and legal conditions in most sending countries. Countries that are poor and poorly governed lack the resources, expertise, and institutional commitment to protect their citizen migrant workers and to harness the economic benefits of migration for long-term development. Although the obvious solution is to help sending countries build their capacity, this solution raises some dilemmas that suggest that capacity building is no guarantee that the paradigm will succeed.

57. See INTERNATIONAL AGENDA FOR MIGRATION MANAGEMENT, *supra* note 14, at 43-44, 65.

58. *Id.* at 40-41.

59. See WORLD BANK, *supra* note 5, at 29. The United Nations Population Division projects that, absent large replacement migration, the populations of Japan and nearly all European countries will decline significantly by 2050. U.N. Dep't of Econ. & Soc. Affairs, Population Div., *Replacement Migration: Is It a Solution to Declining and Ageing Populations?*, ¶ 4, U.N. Doc. ST/ESA/SER.A/206 (2000), available at <http://www.un.org/esa/population/publications/migration/migration.htm>.

A. *Assessing the Capacity Constraint Experienced by Sending Countries*

The ability to effectively regulate migration patterns requires an institutional capacity that generally depends on the strength of the sending country's economy and the existence of a competent government bureaucracy and legal system.⁶⁰ Rule of law development, or good governance, correlates with a government's ability to regulate industry and protect individual rights.⁶¹

A well-governed, rule of law country could at minimum monitor and track its emigrants and might be able to implement more sophisticated programs. To implement any comprehensive regulatory regime, a country needs a legal system in which laws are public, generally applicable, relatively clear and consistent, and widely enforced.⁶² The formal institutions that make and enforce laws should be fair, competent, and efficient in order to narrow the gap between law on the books and law in practice.⁶³ In such countries, according to the paradigm, implementing basic migration management policies revolving around "the 3 R's of recruitment, remittances, and returns [returning migrants] are most likely to set in motion virtuous circles that lead to an economic take off."⁶⁴

A legal system that fails to function properly due to "weak legal institutions, incompetent and corrupt administrative officials and judges, excessive delays, and limitations on access to

60. Political and legal capacity constraints are obviously related to poverty in many ways, starting with the simple problem that it takes money to build institutions that can enforce rights and obligations. See, e.g., Randall Peerenboom, *Show Me the Money: The Dominance of Wealth in Determining Rights Performance in Asia*, 15 DUKE J. COMP. & INT'L L. 75, 80-81 (2004) (discussing the correlation of wealth and rights enforcement).

61. See Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF., Mar.-Apr. 1998, at 96, 97 (stating that rule of law makes possible individual rights and the fair and efficient involvement of government in the economy).

62. See *id.* at 95, 96; KENNETH W. DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* 16-17 (2006); Randall Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, in *ASIAN DISCOURSES OF RULE OF LAW: THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S.* 1, 2 (Randall Peerenboom ed., 2004).

63. See Carothers, *supra* note 61, at 96; Peerenboom, *supra* note 62, at 2-3.

64. PHILIP MARTIN, *MIGRANTS IN THE GLOBAL LABOR MARKET* 51 (2005), available at <http://www.gcim.org/attachements/TP1.pdf>.

justice”⁶⁵ will have trouble implementing the migration regime envisioned by the paradigm. In such countries, the government will find it difficult to ensure the orderly exit and return of migrants. It would experience even more difficulty enforcing laws that protect the rights of migrant workers and implementing migration-and-development programs, because such laws and programs require sophisticated legal institutions and economic infrastructure.

B. *The Effect of Capacity Constraint on the Protection of Migrant Workers’ Rights*

Sending countries often lack the institutional capacity and resources to protect migrant workers’ rights. Basic protection regulations such as exit controls to monitor the outflow of workers, licensing requirements for labor recruiters and contractors, and standards for employment contracts may be overlooked.⁶⁶ Even where the political will exists, sending countries are frequently unable to implement these measures due to their severely limited powers in receiving country territory, inadequate funding, or lack of existing institutions to take on these responsibilities.

Sending countries have limited power to assist citizens who are abroad. Their most basic constraint is lack of territorial jurisdiction on foreign soil. Sending countries also often lack the funds to develop and run their consulates. Mexico has attempted to address constraints on its consulates in the southwestern United States by signing agreements with the U.S. Department of Labor to give consulate staff the training in U.S. labor laws that they need to help Mexican migrant workers file complaints.⁶⁷ Nevertheless, the resolution of such

65. Peerenboom, *supra* note 62, at 7.

66. See *supra* notes 27-33 and accompanying text (noting the types of regulations that are considered important for protecting migrants).

67. Brittney Booth, *Mexican Consulate, U.S. Officials Reach Labor Agreement*, MONITOR, June 3, 2006, at 1 (discussing Mexican consulates in Texas and the Wage & Hour Division); News Release, Occupational Safety & Health Admin. (OSHA), Consulate of Mexico in Omaha, Neb., Joins with OSHA and Other Agencies to Form Safety and Health Alliance (Jan. 13, 2006), available at www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RELEASES&p_id=11785; News Release, OSHA, OSHA and the Consulate of Mexico in Seattle Form Alliance to Assist Workers (Feb. 6, 2006), available at www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=NEWS_RE-

complaints remains within the jurisdiction of the U.S. authorities.⁶⁸

Due to weak domestic institutions, sending countries are often unable to provide administrative and judicial remedies for migrant workers who have returned home. Even in those sending countries where such remedies exist on the books, returned workers frequently cannot access the remedies because of scant government resources, corruption, popular perception of governmental inefficacy, or other institutional capacity problems.⁶⁹

The current “model” sending country, the Philippines, experiences many of these problems in its efforts to protect Filipino migrant workers. Although the government’s proactive management of migration seems to have produced a relatively

LEASES&p_id=11947; News Release, OSHA Joins with Mexican Consulate to Enhance Safety and Health for Mexican Workers in New York and New Jersey (Nov. 8, 2005), *available at* www.osha.gov/pls/oshaweb/owadis.show_document?p_table=NEWS_RELEASES&p_id=11677. The collaboration between U.S. agencies and foreign consulates is extensive in certain metropolitan areas. In Dallas and Houston, for example, the U.S. Department of Labor, the Equal Employment Opportunity Commission, and the Department of Justice have partnered with the Mexican and Salvadorian Consulates, nongovernmental and religious charities, and state and local agencies in the “Justice and Equality in the Workplace Program.” This program helps the consulates and nongovernmental organizations educate Hispanic workers and channel complaints of wage violations, employment discrimination, and other civil rights violations to the appropriate government agency. Press Release, U.S. Dep’t of Labor, Labor Department Launches Hispanic Worker Protection Program (June 10, 2003), *available at* <http://www.dol.gov/opa/media/press/opa/OPA2003306.htm> [hereinafter Hispanic Worker Protection].

68. See Hispanic Worker Protection, *supra* note 67.

69. Receiving countries are also weak on migrant worker protection, but usually not because of weak institutions. Migrant workers, especially those in an irregular situation, are often abused in host countries with strong institutions. Those countries may lack the political will to treat migrant workers as the equals of native workers. Even where, as in the United States, labor and employment law covers all workers universally, the immigration status (regular or irregular) of workers may limit their remedies or deter them from coming forward about labor violations for fear of deportation. See *Rivera et al. v. NIBCO, Inc.*, 364 F.3d 1057, 1065-66 (9th Cir. 2004) (affirming the lower court order to bar discovery of immigration status for fear of the chilling effect on workers’ ability to report abusive and discriminatory employment practices).

low incidence of unauthorized migration,⁷⁰ the Philippines still falls short on protection of migrant workers' rights. For example, the labor attaché at the Philippine embassy or consulate is the official government contact for the migrant worker in distress.⁷¹ However, labor attachés tend to be political appointees without adequate training, experience, or concern.⁷² They are also hamstrung by their reliance on the cooperation of the receiving country's law enforcement authorities.⁷³ Consequently, workers continue to fall prey to recruiters who charge excessive fees and impose illegal employment contracts.⁷⁴

Back in the Philippines, enforcement and remedies are also inadequate. Returned migrant workers may file complaints through two administrative processes, depending on the nature of the complaint.⁷⁵ Under the "joint and solidary liability" provision of the migrant worker law, Filipino recruiters are liable for contract violations of the foreign em-

70. By official estimates, Filipino workers without proper documentation numbered roughly 1.3 million worldwide in 2004, representing 16% of all Filipino migrants. See POEA, STOCK ESTIMATE OF OVERSEAS FILIPINOS (Dec. 2004), <http://www.poea.gov.ph/docs/STOCK%20ESTIMATE%202004.xls>. Many are concentrated in highly vulnerable sectors such as domestic work. O'Neil, *Labor Export*, *supra* note 38. The Filipino statistic—1.3 million unauthorized migrants worldwide (16% of migrants)—may be roughly contrasted with 6.2 million unauthorized Mexican migrants in the United States in 2005, representing 56% of all Mexicans in the United States. JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

71. LABOUR MIGRATION IN ASIA 2005, *supra* note 32, at 21.

72. See Ofreneo & Samonte, *supra* note 52, at 62 (reporting feedback from migrant workers, NGOs, and field research suggesting that the Philippine consulate in Hong Kong is not responsive to Filipino migrant workers' requests for assistance).

73. See, e.g., *id.*

74. See LABOUR MIGRATION IN ASIA 2005, *supra* note 32, at 48-50 (noting consistent increases in violations of recruitment rules and suggesting that the current laws and regulations may not be sufficiently effective).

75. If a violation of recruitment laws is alleged, the POEA has exclusive authority to investigate and levy penalties. *Id.* at 48. If a violation of an overseas employment contract is the issue, the migrant worker should file a claim with the National Labor Relations Council (NLRC). Rep. Act No. 8042 (1995), § 10.

ployers who are their clients.⁷⁶ This is an innovative policy that puts the burden on recruiters to screen out undesirable employers. The POEA fines recruiters for initial violations; after multiple violations, it may suspend or withdraw a recruiter's license or pursue criminal prosecution.⁷⁷ Despite these rationally designed enforcement methods, though, recruiter malpractice and contract violations continue at a high rate.⁷⁸ The legal remedies available in the Philippines are waivable, and workers seeking permission to exit the receiving country are often pressured to sign a waiver agreement.⁷⁹

C. *The Effect of Capacity Constraint on Economic Development*

Sending countries also frequently lack the institutional conditions necessary to encourage the use of remittances in ways that directly promote economic development. Inadequate institutional capacity limits public revenue from remittances, innovation in financing mechanisms that use remittance flows, passive investment in financial instruments, and active investment in sustainable businesses.

To begin with, sending countries derive limited public revenue from remittances. Most governments do not tax incoming remittances directly, though many do tax remittances indirectly through general financial services taxes or through taxes on consumer products sent from abroad to family and friends back home (known as remittances in kind).⁸⁰ Although many governments encourage transfers through formal channels such as banks,⁸¹ migrants often avoid official financial institutions because they perceive these institutions to

76. Rep. Act No. 8042 (1995), § 10; LABOUR MIGRATION IN ASIA 2005, *supra* note 32, at 57.

77. LABOUR MIGRATION IN ASIA 2005, *supra* note 32, at 19-20, 47-48.

78. *Id.* at 49 (noting that the POEA's progressive increases in penalties "[have] not reduced the level of abuse and malpractice by recruitment agencies"); *id.* at 55 tbl.11.1 (showing an increasing number of illegal recruitment cases handled by the POEA); *id.* at 52 tbl.10.3 (showing increasing numbers of NLRC cases).

79. Mary Lou L. Alcid, *Overseas Filipino Workers: Sacrificial Lambs at the Altar of Deregulation*, in INTERNATIONAL MIGRATION AND SENDING COUNTRIES, *supra* note 8, at 99, 115-16.

80. WORLD BANK, *supra* note 5, at 93.

81. *Id.*

be corrupt.⁸² Instead, migrants use unofficial and informal means of transferring money to their home country.⁸³ Finally, even governments that do tax remittances directly are reluctant to do so aggressively for fear of deterring remittances or pushing them further into informal channels, and so they instead encourage more transfers through tax and customs exemptions.⁸⁴

Financial institutions in sending countries that seek to use remittance flows to promote economic development face structural barriers. Financial institutions need a supportive legal infrastructure to secure affordable financing on international capital markets. For example, since 1994, banks in sending countries have securitized future remittance flows with offshore vehicles.⁸⁵ However, targeted legal reforms are necessary before remittances can be leveraged into financing through securitization in these sending countries.⁸⁶ Therefore, most sending countries have not been able to use securitization methods to raise money for development to any significant extent.

Due to capacity constraints, individuals tend to use remittance income in ways that do not significantly promote economic development. Remittances rarely enter the economy

82. See Barry, *supra* note 9, at 36. Of course, migrants also simply want to avoid taxes and fees.

83. Remittances to developing countries through official channels were estimated to be \$167 billion in 2005, but unofficial remittances equal or exceed that figure. WORLD BANK, *supra* note 5, at 85.

84. BIMEL GHOSH, IOM, MIGRANTS' REMITTANCES AND DEVELOPMENT: MYTHS, RHETORIC AND REALITIES 55 (2006), available at http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/ghosh_pdf.pdf.

85. *Cf. id.* at 56 (noting that legal infrastructure constraints may be alleviated through receiving countries' guarantees to back the remittance-based bonds). The "securitization" of remittances is a structured finance technique that allows banks in developing countries to raise capital in a way that shelters them from poor sovereign creditworthiness and currency volatility. See WORLD BANK, *supra* note 5, at 101-02. The banks pledge future remittance receivables to an offshore vehicle and arrange to channel the remittances through this offshore vehicle. *Id.* at 101. Then ratings agencies give investment grade ratings to the banks' securities that are structured based on this future remittance flow. *Id.* at 102.

86. *Cf. WORLD BANK, supra* note 5, at 103 (noting that although the lack of an appropriate legal infrastructure may constrain issuance in some countries, this difficulty may be surmounted through targeted reforms).

through passive or active investments. Instead, families receiving remittances largely use the money to cover basic necessities and consumption (e.g., repaying debts, buying imported appliances, and building houses).⁸⁷ Migrant families avoid passive investments, which can be as simple as depositing money in a bank account, because they do not trust financial institutions and because those institutions often do not offer products that cater to the poorer population.⁸⁸

In addition, poor governance and distrust of institutions deter individuals from active investments such as starting job-creating businesses. Compared to consumption and passive savings, business investments have a direct effect on generating self-sustaining economic activity that creates jobs at home.⁸⁹ In the Philippines, about five percent of remittances funds business investment, while most of the rest funds household expenses and the payment of debts.⁹⁰ Similarly, at least two-thirds of the two billion U.S. “migradollars” remitted to Mexico each year is spent on current consumption and only a small percentage is invested in local Mexican business activities.⁹¹

87. See STALKER, *supra* note 7, at 81; Philip L. Martin, *Labor Migration: Theory and Reality*, in THE UNSETTLED RELATIONSHIP: LABOR MIGRATION AND ECONOMIC DEVELOPMENT 27, 39 (Demetrios G. Papademetriou & Philip L. Martin eds., 1991); Charles Stahl & Ansanul Habib, *Emigration and Development in South and Southeast Asia*, in THE UNSETTLED RELATIONSHIP: LABOR MIGRATION AND ECONOMIC DEVELOPMENT, *id.*, at 163, 177.

88. See Elizabeth Malkin, *Wal-Mart Will Offer Retail Banking in Mexico, an Underserved Market*, N.Y. TIMES, Nov. 24, 2006, at C1 (stating that as many as eighty percent of Mexicans do not have bank accounts and that established banks have largely ignored the working-class Mexican market).

89. See Ofreneo & Samonte, *supra* note 52, at 21 (defining productive investment as investment in activities that create income, jobs, and multiplier effects).

90. *Id.*

91. Jorge Durand et al., *Migradollars and Development: A Reconsideration of the Mexican Case*, 30 INT'L MIGRATION REV. 423, 440 (1996). These authors contend that, with multiplier effects, U.S. \$2 billion of remittances—“migradollars”—actually led to \$6.5 billion of production in agriculture, manufacturing (including petroleum), services, and commerce. *Id.* at 430-33. Of course, current consumption boosts living standards, and poor families predominantly consume basic goods and services produced in Mexico, creating multiplier effects on the economy. *Id.* at 440-41. Remittances do not seem, however, to contribute meaningfully to job-creating growth for the economy as a whole, because productive investment levels remain low. See Ofreneo & Samonte, *supra* note 52, at 21 (defining productive investment).

Among those migrants left with disposable income after their families' necessities are covered, many prefer to spend their money on consumer goods such as televisions rather than invest in a business. This is partly because of the high risks involved in starting a business, especially in countries that lack institutional capacity.⁹² It is widely accepted that good governance—rule of law, protection of contract and property rights, and political stability—promotes business investment and economic growth.⁹³ Conversely, poor governance makes emigrants wary of investing their hard-earned remittance income into relatively risky ventures.⁹⁴ Moreover, the limited institutional capacity of the public sector makes it difficult to sustain business-training programs and publicly funded incentives for investment such as Mexico's *Tres por Uno* program. That program was suspended because the participating governments did not have sufficient funds to match all the remittances pouring into the program.⁹⁵

D. *Capacity Building: Not a Simple Answer to Removing the Capacity Constraint*

International organizations and multilateral initiatives are aware that many sending countries lack capacity.⁹⁶ They have therefore made capacity building a high priority in the emerging paradigm, for example through training and technical assistance for government officials who make and enforce migra-

92. See GHOSH, *supra* note 84, at 65 (noting that migrant households are not accustomed to risk-taking activities given their social background and that the lack of suitable investment opportunities and education in investment are also factors).

93. See, e.g., DAM, *supra* note 62, at 4, 5; Robert R. Summers, *Some Basic Ways Good Law, Good Legal Institutions, Good Legal Traditions, and Principles of the Rule of Law Can Augment Markets*, in MARKET-AUGMENTING GOVERNMENT: THE INSTITUTIONAL FOUNDATIONS FOR PROSPERITY 25 (Omar Azfar & Charles A. Cadwell eds., 2003).

94. Cf. Michael J. Trebilcock & Matthew Sudak, *The Political Economy of Emigration and Immigration*, 81 N.Y.U. L. REV. 234, 263 (2006) (arguing that good governance would make emigrants "more comfortable" with repatriating not only their financial capital but also their human capital in the form of their own skills and labor).

95. O'NEIL ET AL., *supra* note 25, at 28.

96. IOM, *Labour Migration*, *supra* note 56 ("IOM programmes in labour migration vary to fit the specific political, economic and geographic context of the migration environment.").

tion policy.⁹⁷ Ironically, though, high levels of labor migration may make capacity building even more challenging. Where labor migration is already prevalent or immediate emigration pressure is strong, the sending country faces a catch-22: Migrants do not trust the regulated system of labor migration due to incapacity, yet it is difficult to build capacity because educated migrants do not repatriate and remittances provide a safety valve for poor governance.

In evaluating the capacity building solution, it is helpful to outline the options that are theoretically available to sending countries: One, they can decide not to manage labor migration at all until they have the full capacity to implement all of the paradigm's core features. Two, they can implement recommended policies incrementally and develop capacity at the same time.

Delaying migration management contingent on capacity development is favorable if initial attempts to manage migration fail for lack of capacity and thus impede a government's ability to implement protections later. For example, in the 1970s and 1980s the Philippines lobbied for the opening of receiving countries to Filipino workers and monitored the flows of migrant workers and remittances, leading to the development of a large labor export sector and the development of an ingrained culture of migration.⁹⁸ Yet the Philippines did not establish a comprehensive system of migrant rights and remedies until the mid-1990s, when the number of emigrant workers had reached the millions.⁹⁹ The Philippines' early regime of basic oversight of the migration process and promotion of migration for economic development encouraged the growth of emigration, but to such a level that the Philippines had difficulty implementing its later-enacted policies for migrant rights and remedies. The lesson from this example is

97. For instance, "a substantial portion" of the IOM's budget is devoted to programs that build government's capacity to manage migration. IOM, *INTERNATIONAL MIGRATION AND DEVELOPMENT*, *supra* note 10, at 20.

98. Alcidi, *supra* note 79, at 105; *LABOUR MIGRATION IN ASIA 2003*, *supra* note 38 (noting "the growth of a culture in which work abroad is viewed as the only way up").

99. See Alcidi, *supra* note 79, at 109 (recounting that the passage of the comprehensive system of migrant rights and remedies was prompted by public outrage over the government's weak handling of the trial and execution of a Filipina domestic worker).

that a basic regime might increase levels of regularized migration so much that it will be difficult to regulate more vigorously later, when the larger numbers of migrants will have more complex legal and social needs. This suggests that capacity building should be a high initial priority and that governments should be wary of promoting labor migration before they have the institutional wherewithal to adopt all the core features of a properly managed regime.

On the other hand, adopting migration management policies incrementally is favorable if some policies are stepping stones to others. Under this view, the regularization of migration is a stepping stone to enhanced protections for the migrants. More regularized migration (i.e., migration through legal channels) is itself progress if it brings unauthorized migration above ground and makes it possible for governmental and nongovernmental agencies to help the migrants. Labor migration will happen no matter what the government does, so the government might as well regulate it in some way, starting with selected parts of the paradigm and later implementing more complex policies as capacity develops.

These options give rise to a dilemma with respect to capacity building, the abovementioned catch-22. It is difficult to get migrants to trust government-managed labor migration programs when institutions are generally unreliable in their country. Yet it is also difficult to develop institutional capacity when migrants who have the skills and the capital to improve conditions at home have little reason to return to do so. Some countries might actually have a chicken-and-egg problem between capacity building for migration management and the fact that labor migration exists.

Migrants are reluctant to trust government-managed labor migration programs when government agencies are corrupt, unreliable, or both. Sending countries with inadequate capacity are often unable to enforce the laws, leading to a wide gap between formal rules and real enforcement, which in turn exacerbates distrust of the government. When citizens believe their government's regulatory regimes are ineffective, they are less likely to utilize formal channels of migration, legal means of redress, formal channels to remit money, and state-pro-

moted development initiatives.¹⁰⁰ For example, unauthorized migrants from Mexico, Guatemala, and other Latin American countries generally do not trust their governments, given these governments' history of official neglect of the problems of unauthorized migration and abuse of migrants by law enforcement officers.¹⁰¹ The results of this distrust are evident: In Mexico, despite the success of the *Tres por Uno* program in the state that initiated the idea of matching migrants' contributions to community projects, such contributions represented a minute percentage of total remittances.¹⁰²

At the same time, it is difficult to develop institutional capacity when migrants who have the skills and the capital to improve conditions at home have little incentive to do so. Skilled labor migration (the brain drain) may deplete a country of the very people who are needed to improve governance.¹⁰³ Meanwhile, plentiful remittances can help sustain mismanaged or corrupt governments, since citizens are less likely to press for reform when jobs abroad alleviate unemployment at home and provide an economic cushion for families.¹⁰⁴ Sending countries may therefore be insulated from pressures to improve governance.¹⁰⁵ If migration siphons off the skilled manpower needed to increase institutional capacity and remittances provide a safety valve for discontent, the very

100. See Barry, *supra* note 9, at 36 ("Not surprisingly, many emigrant communities are suspicious of their home states' overtures and often are distrusting of remitting via official institutions which they may have experienced as corrupt, inefficient, and unreliable.").

101. See Ginger Thompson, *Mexico Worries About its Own Southern Border*, N.Y. TIMES, June 18, 2006, at A1 (suggesting that Mexico's poor treatment of illegal migrants from other countries may undermine its credibility when it lobbies the United States for more humane border policies).

102. Mexican migrants from the state of Zacatecas, where the *Tres por Uno* program began, remitted U.S. \$1.2 million to the *Tres por Uno* program in 1999 compared with \$300–\$350 million sent to their families. OECD, *supra* note 25, at 151.

103. WORLD BANK, *supra* note 5, at 58.

104. *But see id.* at 105 (arguing that "unlike oil windfalls, remittance inflows do not weaken institutional capacity").

105. See ILO, TOWARDS A FAIR DEAL, *supra* note 1, at 29 (describing emigration as a safety valve that allows productive use of workers elsewhere and opens up employment opportunities for others).

fact that labor migration occurs at all may undermine capacity building.¹⁰⁶

Sending countries experiencing labor migration must consider whether and in what order to implement the paradigm's programs. They also face the catch-22 that lack of institutional capacity may itself be a significant obstacle to capacity building. These problems suggest that capacity building is a difficult enterprise and does not ensure that sending countries will successfully manage labor migration.

IV. BEYOND CAPACITY: QUESTIONING THE FOUNDATIONS OF THE EMERGING PARADIGM

Aside from institutional capacity, sending countries face more fundamental obstacles to simultaneously developing their economies based on labor migration and protecting the rights of migrant workers. This Part contends that the paradigm is fundamentally flawed in both practice and theory. In practice, as I discuss in Part IV.A, the paradigm incorrectly assumes that temporary labor migration can accommodate the interests of sending and receiving countries and migrant workers despite structural inequalities in the global economy. In fact, migration may stunt national economic development in sending countries, and reliance on remittances may serve as a large obstacle to the protection of migrants' rights. The para-

106. The efforts of sending countries to politically engage emigrants might be a way to break the dilemma between inadequate capacity and migrants' low confidence in their home countries' institutional competence. This strategy involves strengthening migrant workers' legal and political relationship with their home state due to recognition that migrant workers form a sizable portion of the political citizenry. See generally Barry, *supra* note 9, at 42-56 (discussing emigration states' legal and political "incorporation" of emigrants). The hope is that the increasing political influence of migrant workers in home country politics and the prospect of attracting their investment money and skills can have a positive effect on institutional capacity building if the migrant workers use their political, economic, and human capital to encourage improved governance and rule of law. See Trebilcock & Sudak, *supra* note 94, at 263-64 (suggesting that the prospect of attracting migrant investment might have a disciplining effect on domestic policies). A policy of strengthening the political ties of citizenship sends a message that the sending country wants to be accountable to its migrant citizens. Whether that is enough of an incentive for migrant workers to actually participate in home country institutions or to take some economic risk is unclear.

digm's theoretical flaws, which I address in Part IV.B, are at least partly responsible for these weaknesses in practice. The paradigm relies primarily on free market theories and norms that explain and justify migration in terms of individual choice and freedom of movement. This theoretical focus results in an incomplete picture of what labor migration is and what it should be.

A. *Promoting Migration Despite Uncertain Development Benefits and Weak Ability to Protect Migrants*

Part III argued that sending countries lacked the necessary institutional capacity to implement the paradigm. This section looks beyond issues of good governance and people's confidence in institutions to reexamine the practical economic operation of temporary labor migration. I argue here that migration might actually stunt development for macroeconomic reasons. Moreover, economic dependence on migration income constrains the extent to which sending countries are able to protect their migrant workers. In practice, implementing the paradigm ensures neither development nor the protection of migrants.

1. *Migration Could be a Structural Barrier to Economic Development*

While migrant remittances alleviate poverty on a temporary basis,¹⁰⁷ the paradigm claims more broadly that migration can reduce poverty on a larger scale, promote economic growth, and generate jobs in the home country—trends that would obviate the need for labor migration in the long run.¹⁰⁸ As discussed in Part III, inadequate institutional capacity is one reason that emigration does not result in sending country development.¹⁰⁹ However, there are more fundamental

107. WORLD BANK, *supra* note 5, at 66.

108. See *ILO Draft Framework*, *supra* note 15, § IX, ¶ 15.2 (emphasizing employment creation as a part of the development goal); *ESSENTIALS OF MIGRATION MANAGEMENT—MIGRATION AND DEVELOPMENT*, *supra* note 24, at 8 (describing the dominant theory as holding that migration lowers unemployment, provides income, and improves migrants' skills—consequences that would eventually make migration unnecessary).

109. See *supra* Part III.C.

macroeconomic obstacles to using migration to drive economic development.

Sending countries may become structurally dependent on labor export, a process characterized by several symptoms. First, a country becomes dependent on migrant remittances as a source of foreign exchange for servicing debt and maintaining the balance of payments; without the foreign currency from remittances, the country's current account would fall behind.¹¹⁰ Second, large remittance inflows lead to the appreciation of the value of domestic currency, which in turn lowers the competitiveness of exports.¹¹¹ Third, labor becomes a leading export and an important source of comparative advantage in the world economy.¹¹²

This economic reliance on remittances "may bring distortions in the economy through inefficient allocation of resources, depress production of tradable goods and export-driven growth, and lead to further dependence on remittances."¹¹³ The short-term benefits of remittances may decrease a sending country's political incentive and ability to focus on sectors that employ workers within that country. In short, the danger for sending countries is that migration becomes "a substitute for development."¹¹⁴

The theory that migration could obstruct development has empirical support. Historically, emigration has not produced broad and long-term development effects.¹¹⁵ For exam-

110. See Hollifield, *supra* note 2, at 893; Stephen Castles, *The Factors that Make and Unmake Migration Policies*, 38 INT'L MIGRATION REV. 852, 866 (2004).

111. WORLD BANK, *supra* note 5, at 104.

112. See Kathleen Newland, *A New Surge of Interest in Migration and Development*, MIGRATION INFO. SOURCE, Feb. 2007, <http://www.migrationinformation.org/Feature/display.cfm?id=580> (noting that countries are beginning to think about exporting labor and skills in terms of comparative advantage); Wehrfritz & Vitug, *supra* note 37 (stating that other Asian countries are likely to emulate the Philippine government's position that "like it or not, the overseas workers constitute the nation's biggest comparative advantage").

113. GHOSH, *supra* note 84, at 60.

114. Castles, *supra* note 110, at 860. Of course, since this is an unsettled debate, others argue against the structural dependence theory. See, e.g., Durand et al., *supra* note 91, at 423.

115. Philip Martin makes the important observation that much current skepticism in the migration and development literature "arises from high expectations, not from the denial that emigration and remittances have im-

ple, an empirical study of the effects of labor migration on Greece, Turkey, and Mexico as well as on other sending countries in Africa, Asia, Latin America, and the Caribbean concluded that despite remittances totaling almost forty billion dollars annually, emigration does not promote development in the sending countries.¹¹⁶ Even international economic organizations concede that while emigration may increase incomes and reduce poverty, it has little effect on growth.¹¹⁷ Some experts have even declared that there is “general acknowledgment that labor migration does not resolve the development dilemma.”¹¹⁸

In the two largest labor-sending countries, the Philippines and Mexico, dependence on labor migration is a structural barrier to development. These two countries continue to experience high rates of domestic unemployment after decades

portant local effects.” Philip L. Martin, *Migration and Development in Mexico*, 79 SOC. SCI. Q. 1, 26 (1998). Proponents of the properly managed temporary labor migration paradigm recognize that the migration-and-development theory has yet to bear significant fruit but insist on the potential of migration to contribute to development. For instance, the ILO reports that “there is not much positive evidence that countries receiving large quantities of remittances have better economic performance.” ILO, *TOWARDS A FAIR DEAL*, *supra* note 1, at 28. Similarly, an IOM report recites that over-reliance on remittances in countries where the necessary structural reforms have not taken place can lead to a vicious cycle of inefficient allocation of resources and depressed production and export-driven growth. See GHOSH, *supra* note 15, annex II, ¶¶ 116-32.

116. Demetrios G. Papademetriou & Philip L. Martin, *Labor Migration and Development: Research and Policy Issues*, in *THE UNSETTLED RELATIONSHIP*, *supra* note 87, at 3, 20 (“Migration is neither capable of correcting the underlying weaknesses of the socioeconomic structure of receiving societies nor can it provide a substantial and sustained impetus for the socioeconomic transformation of emigration countries.”).

117. See, e.g., WORLD BANK, *supra* note 5, at 104 (“To the extent that they increase consumption, remittances may increase per capita income levels and reduce poverty and income inequality, even if they do not directly impact growth.”).

118. Demetrios G. Papademetriou & Philip L. Martin, *Introduction to THE UNSETTLED RELATIONSHIP: LABOR MIGRATION AND ECONOMIC DEVELOPMENT*, *supra* note 87, at xi; see GHOSH, *supra* note 84, at 57 (“[D]espite their impressive contributions to foreign exchange earnings and national income in quite a number of countries and their other positive features, remittance inflows seem to have a rather limited impact on growth and development at the macro-level.”).

of intensive emigration.¹¹⁹ Their struggling economies demonstrate that economic reliance on migration can become a structural feature of the economy that detracts from the development of other potentially competitive industries.¹²⁰

2. *Economic Reliance on Labor Migration Undercuts Migrants' Rights*

The paradigm also fails to consider that economic reliance on labor migration tends to undermine the protection of migrants' rights. Sending countries fear that more protection will result in less labor migration and hence fewer remittances, and governments face a difficult balancing act between the promotion of emigrant labor and the protection of those laborers' rights.¹²¹ The sending countries' economic reliance on labor migration therefore reduces their incentive and ability to insist on protecting their migrant citizens.¹²²

119. See Wehrfritz & Vitug, *supra* note 37 (noting that the Philippines had a fourteen percent unemployment rate in 2004); O'Neil, *Labor Export*, *supra* note 38 (reporting criticism that migration has not created jobs in the Philippines); Marla Dickerson, *Job Creation Jumps in Strong Mexico Economy*, L.A. TIMES, Nov. 18, 2006, at C1 ("Mexico is such a chronic underachiever when it comes to generating employment that one solid year is likely to do little to stem the flow of illegal immigration to the United States.").

120. Joseph Y. Lim & Manuel F. Montes, *The Structure of Employment and Structural Adjustment in the Philippines*, J. DEV. STUD., Apr. 2000, at 149, 179 (discussing how remittances finance trade and current account deficits and the inefficient allocation of resources among industries); Raúl Delgado Wise, *Migration and Imperialism: The Mexican Workforce in the Context of NAFTA*, LATIN AM. PERSP., Mar. 2006, at 33, 40-41 (Mariana Ortega Breña trans.) (asserting that the depopulation of the labor force caused by Mexican emigration to the United States is undermining the development of the Mexican export sector).

121. See LABOUR MIGRATION IN ASIA 2003, *supra* note 45, at 71; Piyasiri Wickramasekera [sic], *Asian Labour Migration: Issues and Challenges in an Era of Globalization* 30 (ILO, Int'l Migration Papers No. 57, 2002), available at <http://www.ilo.org/public/english/protection/migrant/download/imp/imp57e.pdf>.

122. See Hollifield, *supra* note 2, at 893 (noting that some developing countries' "pure manpower polices" leave migrants "vulnerable to human rights abuses and arbitrary expulsion" and that any protections migrants do have depend on the negotiating power of their country); Theresa Lawson, Note, *Sending Countries and the Rights of Women Migrant Workers: The Case of Guatemala*, 18 HARV. HUM. RTS. J. 225, 239 (2005) (acknowledging that Guatemala's ability to negotiate with Mexico and the United States is limited by

Sending country governments fear that their receiving country counterparts will close the doors to migrant workers rather than agree to burdensome obligations. This is apparent in bilateral labor agreements (BLAs), the most common method that countries use to organize the recruitment of labor across borders.¹²³ Even those sending countries with highly capable labor, economics, and foreign affairs departments have trouble securing these agreements at all, much less with worker-protective terms. Some BLAs—usually those in the more legally flexible form of a Memorandum of Understanding (MOU)—fail to specify minimum employment standards and rights of the migrant worker, governing little more than worker entry into the host country and minimum wage.¹²⁴ The Philippines' experience is instructive in this re-

the fact that these two countries have significant economic and political advantages).

123. Daniela Bobeva & Jean-Pierre Garson, *Overview of Bilateral Agreements and Other Forms of Labour Recruitment*, in *MIGRATION FOR EMPLOYMENT: BILATERAL AGREEMENTS AT A CROSSROADS* 11, 12 (Org. for Econ. Co-operation & Dev. ed., 2004) (noting that there are 176 bilateral labor agreements in force in OECD countries). The bilateral labor agreement is an example of one tool in the paradigm that is geared in part toward the protection of migrants' rights, because the terms of the agreements may include a certain minimum wage, policies for monitoring labor recruitment and employment, and policies for the enforcement of contracts. See *INTERNATIONAL AGENDA FOR MIGRATION MANAGEMENT*, *supra* note 14, at 41-42 (explaining that effective practices with regard to labor migration include bilateral programs that meet the labor market needs of countries of origin and destination and which address the rights and responsibilities of all parties and provide for the protection of migrant workers); *ILO Draft Framework*, *supra* note 15, ¶¶ 5.3, 9.9. Of course, BLAs are not the only way governments choose to engage in labor recruitment. See Bobeva & Garson, *supra*, at 14-15 (surveying OECD countries' other methods of recruiting foreign workers, such as sector-based or skill-based visa policies that recruit workers regardless of nationality). Many BLAs were concluded following World War II, but lapsed after the oil crisis in the early 1970s. However, they have re-emerged since the 1990s as a popular mechanism for managing labor migration. See *ILO, TOWARDS A FAIR DEAL*, *supra* note 1, at 84-85 (briefly surveying the history of BLAs).

124. The 2004 MOU between Malaysia and Indonesia is an example. See *HUMAN RIGHTS WATCH, HELP WANTED: ABUSES AGAINST FEMALE MIGRANT DOMESTIC WORKERS IN INDONESIA AND MALAYSIA* 53-54 (2004), available at <http://hrw.org/reports/2004/indonesia0704/indonesia0704simple.pdf>. The MOU governs the migration of workers from Indonesia, including those headed for jobs in construction, factories, and plantations, but excludes domestic workers. It provides for an identity card for migrant workers and

gard: While the Philippine government is eager to secure bilateral labor agreements as a way to strengthen worker protection, only 21 of the over 160 countries where Filipino workers are deployed have such agreements with the Philippines.¹²⁵ Sending states' economic reliance on labor migration even results in their acceptance of conditions imposed by receiving countries that violate basic human rights, such as mandatory regular pregnancy testing (in Singapore) or confiscation of passports by employers (in Indonesia and Malaysia).¹²⁶

Market competition also works to depress standards for migrant workers. Competition among migrant workers is so fierce in some sectors that sending countries are reluctant to take an aggressive stance on labor standards that could impede the employment of their own citizens.¹²⁷ For example, among countries supplying household workers, Indonesia and Thailand have somewhat eroded the Philippines' previously dominant share of the market in Singapore and Hong Kong. This trend is attributed to the willingness of Indonesian, Thai, Sri Lankan, and other countries' household workers to work for less than the Philippine government-mandated minimum

specifies that round-trip airfares should be jointly paid by Indonesian labor recruiters and Malaysian employers. Additionally, it provides that migrant workers should earn a minimum salary of ten U.S. dollars per day.

125. Alcid, *supra* note 79, at 112; *see also id.* at 115-16 (discussing weak protections for workers in the implementation of the Saudi-Philippines labor agreement).

126. Wickramasekara, Statement, *supra* note 18, at 6 (noting that "some recent agreements resemble 'glorified repatriation or readmission programmes' . . . [and] some Asian labour-receiving countries impose MOUs on origin countries, which sacrifice fundamental worker rights"); Martin Ruhs, *Temporary Foreign Worker Programmes: Policies, Adverse Consequences, and the Need to Make Them Work* 9 (ILO, Perspectives on Labour Migration No. 6, 2003), available at <http://www.ilo.org/public/english/protection/migrant/download/pom/pom6e.pdf> [hereinafter Ruhs, *Temporary*] (reporting that female migrant workers in Singapore must undergo mandatory pregnancy testing every six months, with the threat of immediate deportation in the case of a positive test result); HUMAN RIGHTS WATCH, *supra* note 124, at 53.

127. *See* Forman, *supra* note 38, at 64 (noting that "aggressive responses [to abuse of overseas workers, such as banning deployment] are typically followed either by premature capitulation or forfeiture of the labor market to competing countries").

salary, which for many years was U.S. \$200 per month and was recently increased to \$400 per month.¹²⁸

Sending countries face practical challenges such as macroeconomic barriers to development and economic pressure to relax labor standards that institutional capacity building cannot address. The next section examines the theoretical foundations of the paradigm to better understand why the paradigm makes these flawed practical claims.

B. *Problematic Reliance on Free Market Migration Theories and Norms*

In addition to flawed practical claims, the paradigm's underlying theories and norms fail to justify promoting temporary labor migration to sending countries. International organizations working on labor migration, including the ILO and the IOM, justify the paradigm using theories and norms that emphasize individual choice, including the idea of freedom of movement and the "free market" theory of migration.¹²⁹ I argue that because the paradigm relies primarily on these theories and norms, it provides an incomplete and biased account

128. Manolo I. Abella, Chief of Int'l Migration Program, ILO, Paper given at the Annual Bank Conference on Development Economics—Europe: Labour Migration in East Asian Economies 6 (May 10-11, 2004), *available at* [http://wbIn0018.worldbank.org/eurvp/web.nsf/web.nsf/Pages/Paper%20by%20Abella/\\$File/MANOLO+ABELLA.PDF](http://wbIn0018.worldbank.org/eurvp/web.nsf/web.nsf/Pages/Paper%20by%20Abella/$File/MANOLO+ABELLA.PDF). In late 2006, the Philippines government doubled the minimum salary for Filipino domestic helpers in all host countries to four hundred dollars per month as part of a set of raised standards for the emigration of domestic helpers, with the recognition that this move would cause a loss of market share in the domestic worker business. Press Release, Phil. Dep't of Labor & Employment, Upgraded Minimum Salary for Filipino DHs Won't Affect Deployment, Remittances—Labor Chief (Nov. 25, 2006), *available at* <http://www.dole.gov.ph/news/details.asp?id=N000001969>; Press Release, POEA, POEA Governing Board Approves Reforms on Deployment of Domestic Helpers (Dec. 21, 2006), *available at* http://www.poea.gov.ph/news/2006/PR-Dec2006_%20DH%20Package.pdf. The new policy led to strong criticisms from recruitment agencies, whose business stood to suffer, leading labor officials to adjust some elements of the new policy. Press Release, Phil. Dep't of Labor & Employment, POEA Governing Board Relaxes Age, Training Requirements but US\$400 Salary, No Placement Fee Policy Stays (Feb. 2, 2007), *available at* <http://www.dole.gov.ph/news/details.asp?id=N000002011>.

129. *See supra* note 27; *infra* notes 131-36 and accompanying text for a discussion of this theoretical framework.

of what the costs and benefits of labor migration are and what they should be.

1. *Freedom of Movement Does Not Justify the Temporary Labor Migration Paradigm*

The emphasis on freedom of movement in the paradigm does not enhance our understanding of the reality of labor migration and only muddies the terms of the policy debate.¹³⁰ International organizations invoke freedom of movement in order to encourage governments to allow their citizens to leave and exercise the right to move in authorized channels of migration.¹³¹ However, full freedom of movement would require that migrant workers be free to leave both the sending country *and* the receiving country (by quitting their foreign jobs). In reality, the concept of freedom of movement is too blunt to either describe the difficulty of upholding the rights of temporary labor migrants or to inform sending countries' policy decisions.

On the sending country end, the concept of freedom of movement has limited utility because it does not support specific labor migration policies and ignores the common belief among migrants that they have no choice but to leave their family and home. The concept is only important for countries like North Korea and China that currently do not allow their citizens to emigrate freely. So long as the government *allows* people to leave, the concept of freedom of movement is irrelevant to what kind of labor migration regime and policies the sending country should promulgate. From the migrant's perspective, the idea that individuals have "the power to choose" to migrate for work is rhetorically powerful—it conjures up images of educated professionals seeking ever-improving opportunities without regard to national borders.¹³² For un-

130. Perversely, freedom of movement can be (mis)used by states as a justification for *not* regulating labor migration at all, including policies that protect migrants. *See id.*

131. *See generally* Douglas Massey et al., *Theories of International Migration: A Review and Appraisal*, 19 POPULATION & DEV. REV. 431 (1993) [hereinafter Massey et al., *Theories*].

132. The idea of the emigrant's "power to choose" to leave her country is an essential component of migrants' rights and a powerful rhetorical tool for international organizations involved in migrant protection. "The Power to Choose" is the theme of a video produced by the IOM Philippines office "to

skilled and low-skilled workers, however, freedom of movement is a norm without real meaning because of their limited economic options.

On the receiving country end, freedom of movement means little when migrant workers often lack the practical ability to quit exploitative employment situations. In theory, migrant workers should be able to leave their employment at any time. In reality, especially when compared to skilled workers, temporary labor migrants lack the leverage vis-à-vis employers to benefit from the freedom to quit.¹³³ Migrant workers are deterred from exercising their right to freedom of movement by their fear of losing their visas, being deported,¹³⁴ or suffer-

help sustain the efforts of the Government of the Republic of the Philippines to manage labour migration flows through increased awareness of Filipino migrant workers about legal migration channels and procedures in main destination countries." Human Trafficking.org, Philippines, International Organizations, International Organization for Migration (IOM), <http://www.humantrafficking.org/organizations/295> (last visited Nov. 29, 2007). See also IOM—Philippines, <http://www.iom.int/jahia/page502.html> (last visited Nov. 29, 2007) (listing as one of IOM's projects in the Philippines "regular migration and sustainable reintegration of overseas Filipino workers: upholding their power to choose").

133. Freedom of movement may be analogized to the freedom of contract, which benefits skilled or managerial workers who have bargaining power but does not necessarily empower unskilled, fungible workers. Admittedly, unskilled and skilled workers alike are often bound to sponsoring employers in the sense that their visas (their right to lawful presence) are tied to a job. See, e.g., Joan Fitzpatrick & Katrina R. Kelly, *Gendered Aspects of Migration: Law and the Female Migrant*, 22 HASTINGS INT'L & COMP. L. REV. 47, 82 (1998) (noting that Hong Kong's regulation requiring domestic workers to depart within two weeks of termination of employment "empowers employers because dismissal may be tantamount to deportation"). However, skilled workers have many employers who are willing to sponsor them and more countries where their skills might be welcome, whereas unskilled workers have far fewer options. See Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 153 (2006) (arguing that there is growing international competition for skilled immigrants, driven by an assumption that proactive recruitment is necessary to compete in the "global race for talent").

134. According to many host countries' temporary worker immigration rules, the migrant worker's visa is tied to a specific employer sponsor. See Ruhs, *Temporary*, *supra* note 126, at 9 (noting that six major temporary worker programs in five countries around the world restrict the admitted foreign worker to a specific employer).

ing informal penalties such as blacklisting by labor recruiters.¹³⁵

For all of these reasons, freedom of movement is largely irrelevant to the debate about whether the paradigm benefits sending countries and migrants. It does not contribute to understanding migrants' decisionmaking processes or to sending countries' policymaking beyond simply allowing migrants to depart. It has rhetorical value in supporting policies that facilitate labor mobility, but little salience for the claims of the paradigm.

2. *Free Market Theories Provide an Incomplete Picture of Labor Migration*

The emerging paradigm is strongly influenced by neoclassical economic and network theories of international migration, which I call the free market theories.¹³⁶ These theories assert that temporary labor migration arises from individual economic decisions and benefits societies by raising individual welfare and collectively reducing the need for temporary labor migration in the long term.¹³⁷ Because the paradigm draws heavily on these theories, it provides an incomplete picture of labor migration that is biased toward normative assessments based on individual choice and individual welfare. The paradigm fails to consider an important set of alternative theories, known as structural theories, which expose the conflicts and tensions between macroeconomic forces and the interests of migrant workers and sending countries. Understanding the theoretical biases of the paradigm therefore casts doubt on its recommendations.

135. Cf. LABOUR MIGRATION IN ASIA 2003, *supra* note 45, at 56 (noting that migrant workers are blacklisted for joining workers' organizations).

136. See Massey et al., *Theories*, *supra* note 131, at 433 (explaining how the neoclassical economic theory of migration has strongly influenced the migration policies of international organizations). As explained by the IOM, migration has three primary determinants: "(1) The 'pull' of changing demographics and labour market needs in many industrialized countries. (2) The 'push' of population, unemployment and crisis pressures in less developed countries. (3) Established inter-country networks based on family, culture and history." LABOUR MIGRATION IN ASIA, *supra* note 45, at 79.

137. See ESSENTIALS OF MIGRATION DEVELOPMENT—MIGRATION AND DEVELOPMENT, *supra* note 24, at 8 (describing the dominant theory as holding that migration lowers unemployment, provides income, and improves migrants' skills—consequences that will eventually make migration unnecessary).

The free market theories emphasize individual economic decisions and individual welfare.¹³⁸ According to the “pull and push” theory of migration, labor migration is the aggregate result of individuals’ responses to the wage differentials arising from the different economic and demographic conditions among countries.¹³⁹ Complementarily, network theory holds that migrant networks facilitate migration (though they may not be the underlying cause) because “they lower the costs and risks of movement and increase the expected net returns to migration.”¹⁴⁰

Because they focus on rational individual choice, the way free market theories view the costs and benefits of labor migration is naturally biased in favor of promoting increased flows of workers across borders to the extent desired by the market. They portray the macroeconomic disparities among communities and nations as simply the factual context in which individuals make choices for their personal and family welfare. In doing so, such theories ignore the effect of macroeconomic disparities on the conditions of migrant workers on the ground. By positing that migration leads to economic development, free market theories of migration assume away the problem of global inequality. Because of their failure to account for the complex relationship between migration and growth, these theories provide a biased account of the costs and benefits.

In contrast, structural theories focus on the conflicts and tensions between macroeconomic forces and the interests of

138. *See id.*

139. The free market account of temporary labor migration emphasizes individuals’ and families’ choices given the demand-side (pull) and supply-side (push) conditions of the market, based on their assessment of how to maximize income and minimize risks. *See Massey et al., Theories, supra* note 131, at 434-36.

140. *Id.* at 448. Would-be migrants who have familial and social ties to earlier migrants or returned migrants find it easier to gain access to foreign employment—they have “inside information” on particular recruiters and employers, for instance—and assistance in the foreign country should they need it. *See id.* at 449 (explaining network migration as relationships between migrants and friends/kin in the destination area that provide access to employment and assistance). *See generally* WORLD BANK, *supra* note 5, at 59-62 (describing the risks and costs of migration, the inadequate information most migrants have when they make the decision, and the role of the diaspora community in lowering the costs).

migrant workers and sending countries. For example, the world systems theory posits that labor migration is the result of the exclusion of the poor from the primary opportunities of the world market. According to this theory, exclusion occurs because the market is structured through the policies of neocolonial governments, the interests of national elites, and the activities of multinational corporations.¹⁴¹ International capital, such as private foreign investment and loans from international and foreign institutions, creates dislocations in the domestic economy that in turn create emigrants.¹⁴² Another structural theory, dual labor market theory, sees international labor migration as primarily caused by a demand for labor that is built into post-industrial economies.¹⁴³ These structural theories are explicitly political; they trace labor migration to “the exploitative political-economic relationship between sending and receiving societies.”¹⁴⁴

Through the lens of structural theories, we get a different and broader view of labor migration’s causes and impacts. In the structural view of the migration-development nexus, macroeconomic processes produce global economic inequalities and constrain the life choices of individuals based on their location in a specific country.¹⁴⁵ The structural theories question the foundation of the free market theories by asserting that the human costs of labor migration are not justified by the unwarranted assumption that development based on cheap mobile labor will reduce the need for migration in the future.

Structural theories suggest that the underlying free market justifications for the paradigm overestimate its benefits and underestimate its costs. Individual choice-based theories and norms enable the paradigm to claim the goals of economic development and migrant rights protection while downplaying the contradictions and tensions within and between these goals. This Note does not defend any theory as the right one,

141. See Massey et al., *Theories*, *supra* note 131, at 444-45.

142. See *id.* at 444 (“[T]he penetration of capitalist economic relations into peripheral, noncapitalist societies creates a mobile population that is prone to migrate abroad.”).

143. See *id.* at 440-44.

144. Jon Goss & Bruce Lindquist, *Conceptualizing International Labor Migration: A Structuration Perspective*, 29 INT’L MIGRATION REV. 317, 322 (1995).

145. *Id.* at 318 (describing the structural perspective).

because each likely provides only part of the picture.¹⁴⁶ Rather, it illustrates the weaknesses in the paradigm's reliance on free market theories and encourages a more holistic perspective. Achieving the laudable goals of the paradigm requires rethinking international labor migration through a holistic perspective.

V. RETHINKING THE PARADIGM STARTS WITH RECOGNIZING THE PARADIGM AS POLITICAL

International organizations' (IOs) promotion of the paradigm in the form of best practices is an obstacle to rethinking the paradigm. Organizations such as the IOM and the ILO frame the paradigm as an objective and nonpolitical process of designing and implementing the "best" labor migration program.¹⁴⁷ This fosters path dependence and tunnel vision, narrowing the range of choices available in domestic political and economic decisionmaking. An objective evaluation of the paradigm requires recognizing that its substantive policies and philosophies are not technical best practices, but rather political and economic choices.

IOs frame the paradigm as a set of best practices because they believe they are providing objective, nonpolitical advice. The paradigm gives the impression that migration management is a policy choice resulting from "discrete, voluntaristic acts, not the process of coming to terms with conflicting interests in the process of which choices are made and exclusions effected."¹⁴⁸ IOs are able to promote the paradigm in this way because they exert significant influence on sending countries' policies through the provision of technical assistance and con-

146. Some have criticized the academic literature on migration for being mired in the ideological divergence between "functional approaches," emphasizing migration as a result of individual motivations, and "structural approaches," emphasizing migration as a result of macroeconomic processes. See, e.g., Goss & Lindquist, *supra* note 144, at 318.

147. See generally Martin & Straubhaar, *supra* note 20.

148. ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD 122 (1995). "This view sees policy and planning as a systematic, information-based process composed of fixed stages (problem definition; identification and assessment of alternatives; policy formulation; program implementation; and evaluation)." *Id.*

ditional multilateral aid.¹⁴⁹ As a result, migration policies in sending countries are more exposed to international influence than are migration policies in receiving countries.¹⁵⁰

By adopting the paradigm as recommended, sending countries avoid or obscure the deliberate political and economic choices that characterize any domestic political process. This is a lesson learned from other international development projects.¹⁵¹ As one scholar noted in relation to international organizations' work on food and nutrition in Latin America in the 1970s:

[A]gendas and decisions appear natural; decisions are seen as following automatically from analysis, and it never seems that a different decision could have been reached. Decisions are, in fact, foregone conclusions, the genesis of which is almost impossible to identify, because *the choices and debates are hidden by the model*. Further inquiry into what alternatives could have been followed is precluded when policy is seen as the result of a rational ends-means process.¹⁵²

149. See Vivien Collingwood, *Assistance with Fewer Strings Attached*, 17(1) ETHICS & INT'L AFF. 55, 55 (2003) (reviewing the practice of conditional financial assistance).

150. In receiving countries, the policy debates generally do not refer to best practices, focusing instead on how to craft migration policies to suit the countries' needs and concerns. The formation of labor immigration policy in Western democracies is typically described as one by which the interest groups that are most directly affected by labor migrants (employers and workers) clash and compromise. See Castles, *supra* note 110, at 866; Massey, *supra* note 13, at 312-13. In authoritarian receiving countries, the process is more directly dictated by labor market needs and socio-cultural constraints, as interpreted by the ruling bureaucracy. See Ruhs, *Temporary*, *supra* note 126, at 9 (noting the socio-cultural restrictions on labor migrants and the restriction of foreign workers to certain occupations in Kuwait and Singapore).

151. For example, the law and development movements have been criticized for imposing ill-fitting Western conceptions of law on developing countries undergoing legal reform. See, e.g., David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1077-78 (1974); David Kennedy, *Law and Developments*, in LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY, ESSAYS IN HONOUR OF PETER SLINN 17, 19 (John Hatcher & Amanda Perry-Kessaris eds., 2003).

152. ESCOBAR, *supra* note 148, at 122 (emphasis added).

The emerging paradigm for labor migration could be subject to the same pitfall, because the best practices model tends to suggest that policy choices are foregone conclusions. An analogy to international organizations' law reform projects is also illustrative. In this arena, the idea of "rule of law" evokes "a domain of expertise, a programme for action,"¹⁵³ and a "panacea" for addressing broad problems of political and economic ordering.¹⁵⁴ Similarly, the paradigm of managed temporary labor migration promises a rational, government-led response to a broad and complex phenomenon. When IOs promote the paradigm, they have already made the normative judgment that labor migration is beneficial, "obscur[ing] the need for distribution choices or for clarity about how distributing things one way rather than another will, in fact, lead to development."¹⁵⁵

The supposedly objective and nonpolitical origin of the paradigm fosters path dependence. Once a sending country commits to managed temporary labor migration, initially hidden economic and political choices can ossify because of political demands from institutional interests created by the very same labor migration regime. For instance, the Philippines' promotion of labor migration contributed to a "culture of migration" that precludes the government from fundamentally changing course toward a more restrictive or cautious policy.¹⁵⁶ Once labor migration became the norm in the Philippines, institutional interests such as the labor recruitment industry developed deep stakes in its continuation, lobbying for specific policies that serve the industry's interests.¹⁵⁷ Meanwhile, new voices that were not a part of the initial decisions have found it impossible to reverse the government's active promotion of migration and instead must seek smaller gains in

153. Kennedy, *supra* note 151, at 19.

154. Carothers, *supra* note 61, at 95.

155. Kennedy, *supra* note 151, at 19.

156. See Massey et al., *Theories*, *supra* note 131, at 452-53 (describing the culture of migration as a force that facilitates continued emigration flows).

157. According to Douglass North, path dependence results when an institutional framework gives certain individuals and organizations with bargaining power "a crucial stake in perpetuating the system." Douglass C. North, *The New Institutional Economics and Third World Development*, in *THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT* 17, 20 (John Harsiss et al. eds., 1995).

protections for migrants.¹⁵⁸ As a result, the Philippines' initial policy of short-term dependence on labor export has turned into long-term dependence.

When particular policies are said to be backed by technical expertise and best practices, alternative paths to development do not even appear on the table for debate due to tunnel vision or a "narrowing of ideological range."¹⁵⁹ Framing the emerging paradigm as a set of objective and nonpolitical best practices for dealing with labor migration makes it easier for sending countries to adopt but risks fostering the ideological perception that no other approach exists.

These dangers underscore the need to question from the beginning whether and for what interests temporary labor migration is actually beneficial. The distributional choices and impact on individuals and societies must be subjected to scrutiny at the outset and periodically thereafter. Otherwise, the paradigm's objective and nonpolitical framing confers legitimacy on policies that may be both illegitimate and unwise in the intended beneficiary country but that persist due to tunnel vision and path dependence.

VI. CONCLUSION

The claim that managed temporary labor migration can respect the rights of migrants and promote economic development has emerged as one of the most popular ideas in migration policy. It is an appealing paradigm, because it articulates universally desirable goals and provides a principled way for states to respond to international labor migration.

This Note calls for more scrutiny of efforts to promote managed temporary labor migration. I have explained how the paradigm falls short of its claims, particularly those about benefits to sending countries and migrant workers. I have presented several reasons why managed temporary labor migration is *not* necessarily conducive to sending country economic development or to the protection of migrants. One reason is inadequate institutional capacity: Many sending countries lack the legal and institutional conditions necessary

158. See Alcidi, *supra* note 79, at 114-17 (advocating for maintenance and strengthening of laws protecting migrant workers and against deregulation of the overseas labor recruitment industry).

159. Kennedy, *supra* note 151, at 19.

to manage temporary labor migration in the manner envisioned by the paradigm. More fundamentally, the practical premises of the paradigm are flawed: The developmental outlook for countries that rely on labor migration is uncertain, and economic reliance on labor migration undermines the protection of migrants' rights. Furthermore, the paradigm provides an incomplete and biased picture of migration, because it relies heavily on the rhetoric of freedom of movement and on free market theories. The paradigm's framing as a set of objective and nonpolitical best practices impedes meaningful reconsideration of the promotion of temporary labor migration to sending countries.

Although this Note has discredited the paradigm's main claims, it is not immediately clear whether any ideal combination of policies exists for sending countries to address temporary labor migration. Any policy would not only need to overcome institutional incapacity and competition problems, but would also need to recognize the structural disadvantage of sending countries vis-à-vis host countries, the potential for dependency on labor export, and the attendant human and social costs. Ultimately, when it comes to sending country policies on labor migration, the question is not one of regulatory design but of interests and priorities.